CHONG LEE KIAN

v.

WONG SEAK MEI & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
EUSOFF CHIN J
[CIVIL SUIT NO. 13 OF 1983]
5 MARCH 1992

LAND LAW: *Application for specific performance - Sale and purchase agreement - Conveyance - Exchange of documents not executed in escrow - Property charged by developer to bank - Both parties materially aware of this fact - Common solicitor - Land title still with bank at the time of signing of sale and purchase - Defendant refuses to sign transfer form - Plaintiff had discharged obligations - Whether unilateral repudiation puts an end to contract.*

The first defendant had bought a piece of land HS(M) 779 Lot PTD 1968, 1760 sq. feet Bandar Muar with a terrace house on it, from the second defendant Euro - Malaysia Holdings Sdn. Bhd., which was a housing developer. The first defendant paid the full purchase price to the developer which was RM22,300.

The first defendant then, on 11 May 1980 executed a sale and purchase agreement. The first defendant agreed to sell the land with the terrace house to the plaintiff for RM50,500. A deposit of RM10,100 was paid to the first defendant. The balance of the purchase price was to be paid on 10 July 1980 and the first defendant would transfer the land to plaintiff free from encumbrance.

At the material time, when the sale and purchase agreement was executed on 11 May 1980, the land together with all lands in the housing scheme had been charged by the developers to the United Asian Bank. Both the plaintiff and the first defendant were aware of this fact. The conveyancing documentation was done by a common solicitor acting for the developer, the plaintiff and the first defendant.

Inter alia, three days before the completion date, the plaintiff went to M/s E. Ramasamy and deposited the balance of the purchase price which was RM40,400 and a receipt was issued to the plaintiff.

Since the charge to the bank had not yet been discharged, the plaintiff through the common solicitor informed the first defendant of two alternatives, that is:

(i) extend the completion date until the title was discharged from the bank; or

(ii) execute a transfer on Form 14A of the National Land Code in escrow, on the understanding that the balance of purchase price be refunded by the first defendant to the plaintiff within 7 days if the transfer could not be registered for any reason.

The first defendant upon receiving the notice from the common solicitor, went to the common solicitor's office to collect the balance of the purchase price of RM40,400. The common solicitor refused to give her the RM40,400 because the land title was still with the bank, and because the first defendant refused to sign the transfer form in escrow.

Upon the subsequent notice given by the first defendant to rescind the sale and purchase agreement, which the plaintiff refused to accept.

The charge of the land to the bank was finally discharged by the developer on 21 August 1982. The plaintiff again tendered the balance of purchase price but was refused by the first defendant.

The plaintiff then filed the suit for specific performance of the sale and purchase agreement.

Held:

[1] The Court took the view that, the 1st defendant had acted unreasonably in refusing to complete the sale. She was given the alternative to either to extend the date of completion of the sale or sign the land transfer form in escrow, she refused to do either of these although she was keen to collect the balance of the purchase price, and when the common solicitor had refused to give her the money, she unilaterally terminated the sale agreement.

[2] In *Caltex Oil (Malaya) Ltd*., it was held that an unilateral repudiation of a contract does not put an end to the contract.

[3] In this case this Court finds that the plaintiff had acted reasonably in agreeing to part with the balance of the purchase price on condition that the 1st defendant signed the land transfer form in escrow until the charge to the bank was discharged.

[Plaintiff's application for an order of specific performance and order in terms allowed. Defendant's counterclaim dismissed.]

Case referred to:

Caltex Oil (Malaya) Ltd. v. Ho Lai Yoke & Anor. [1964] MLJ 80 ***(foll)***

For the plaintiff - S.P. Chandra; M/s. S.F. Pang & Chandra
For the respondent - A.K. Yeong; M/s. A.K. Yeong & Co.

JUDGMENT

Eusoff Chin J:

Wong Seak Mei, the 1st defendant had bought a piece of land HS(M) 779 Lot PTD 1968, 1760 sq. feet Bandar Muar with a terrace house on it, from the 2nd defendant Euro - Malaysia Holdings Sdn. Bhd., which was a housing developer. The 1st defendant paid the full purchase price to the developer which was RM22,300.

The 1st defendant then on 11 May 1980 executed a sale and purchase agreement (Exh. D5). The 1st defendant agreed to sell the land with the terrace house to the plaintiff for RM50,500. A deposit of RM10,100 was paid to the 1st defendant. The balance of the purchase price was to be paid on 10 July 1980 and the 1st defendant would transfer the land to plaintiff free from encumbrance. When the sale and purchase agreement was executed on 11 May 1980, the land together with all lands in the housing scheme had been charged by the developer to the United Asian Bank. Both the plaintiff and the 1st defendant were aware of this fact.

M/s E. Ramasamy acted as the common solicitor acting for the developer, the plaintiff and the 1st defendant.

Three days before the completion date, that is on 8 July 1980, the plaintiff went to M/s. E. Ramasamy and deposited the balance of the purchase price which was RM40,400 and a receipt was issued to the plaintiff.

Since the charge to the bank had not yet been discharged, the plaintiff through the common solicitor informed the 1st defendant of two alternatives, that is (i) extend the completion date

until the title was discharged from the bank; or (ii) execute a transfer on Form 14A of the National Land Code in escrow, on the understanding that the balance of purchase price be refunded by the 1st defendant to the plaintiff within 7 days if the transfer could not be registered for any reason.

The 1st defendant upon receiving the notice from the common solicitor, went to the common solicitor's office to collect the balance of the purchase price of RM40,400. The common solicitor refused to give her the RM40,400 because the land title was still with the bank, and because the 1st defendant refused to sign the transfer form in escrow. Two days later the 1st defendant gave a notice dated 12 July 1980 to rescind the sale and purchase agreement, which the plaintiff refused to accept. The charge of the land to the bank was finally discharged by the developer on 21 August 1982. The plaintiff again tendered the balance of purchase price but was refused by the 1st defendant. The plaintiff then filed this suit for specific performance of the sale and purchase agreement.

I find that both the plaintiff and 1st defendant were aware that when they entered into the agreement, the whole housing estate including the plaintiff's land was charged to the bank. The 1st defendant said that she relied on Clause 3A in the agreement which said that if she could not transfer the land on the completion date due to reason beyond her control she could refund the deposit amount of RM10,100 only. She claimed that because the land was still charged to the bank, and she was not having the land title, she could not effect the transfer to the plaintiff.

I think that in this case, the 1st defendant had acted unreasonably in refusing to complete the sale. She and the plaintiff knew all along that the land was charged to the bank by the developer, and that unless the developer discharged the charge, the land title could not be issued to her (1st defendant). Therefore she was given the alternative to either to extend the date of completion of the sale or sign the land transfer form in escrow. She refused to do either of these although she was keen to collect the balance of the purchase price, and when the common solicitor had refused to give her the money, she unilaterally terminated the sale agreement.

In *Caltex Oil (Malaya) Ltd. v. Ho Lai Yoke & Anor.* [1964] MLJ, 80, it was held that a unilateral repudiation of a contract does not put an end to the contract.

In this case I find the plaintiff had acted reasonably in agreeing to part with the balance of the purchase price on condition that the 1st defendant signed the land transfer form in escrow until the charge to the bank was discharged. I, therefore, allowed the plaintiff's application for the following orders:

(a) Specific performance of the agreement of sale between the plaintiff and the 1st defendant dated 1l May, 1980 for the sale and transfer by the defendant to the plaintiff all the piece of land held under HS(M) 779, known as Lot No: PTD 1968, containing an area of 1760 square feet or thereabouts and situate in the Mukim of Bandar in the District of Muar, in the state of Johore together with a terrace house erected thereon and known as No: 21, Taman Junid Dalam (Taman Fortuna), Muar, Johor;

(b) That the property known as Lot No: PTD 1968 as in qualified title HS(M) 779 Mukim Bandar, Muar, Johor, together with the house known as No: 21, Taman Junid Dalam (Taman Fortuna) Muar, Johore, be transferred by the 2nd defendant directly into the name of the plaintiff and that for such purpose the 2nd defendant do execute all the necessary documents of transfer;

(c) Alternatively in the event of the 2nd defendant failing to execute the memorandum of

transfer in favour of the plaintiff within fourteen (14) days from the date of the order herein, then the Senior Assistant Registrar of this Honourable Court be empowered to execute the necessary memorandum of transfer on behalf of the 2nd defendant in favour of the plaintiff;

(d) That the plaintiff be at liberty to deposit the balance of the purchase price being RM40,400 into the Court within 14 days from the date of the order of this Court unless collected earlier by the 1st Defendant;

(e) That the 1st defendant be at liberty to collect this sum of RM40,400 from the Court at any time after the registration of the transfer;

(f) Costs;

The 1st defendant had made a counterclaim against the plaintiff because after signing the sale & purchase agreement on 11 May 1980 the plaintiff had taken possession of the keys to the terrace house from the common solicitor or the developer on 19 May 1980, and subsequently had either stayed there or rented on the house to prevent the house from being vandalised. But I find there is no evidence that the house had been rented out by the plaintiff. There is also no evidence by the 1st defendant to show how much rent the house could fetch if rented. In any event the house was only occupied for about 1½ months by the plaintiffs up to the agreed completion date of sale, and damage if any, suffered by the 1st defendant in the form of rental is negligible.

Since I had made the order for specific performance, I dismissed the counterclaim of the 1st defendant.

Also found at [1992] 2 CLJ 995